154

(4)

Supreme Court, U.S.
FILED
FEB 17 2010
OFFICE OF THE CLERK

No. 09-263

IN THE

Supreme Court of the United States

SANDRA FERGUSON,

Petitioner,

v.

ERIC HOLDER,
ATTORNEY GENERAL OF THE UNITED STATES.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

Amy Howe
Kevin K. Russell
Howe & Russell, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814
(301) 941-1913

Patricia A. Millett
Counsel of Record
Thomas C. Goldstein
Monica P. Sekhon
Akin, Gump,Strauss,
Hauer & Feld LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000
pmillett@akingump.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONER 1

A. The Conflict Has Expanded Still Further 1

B. The Question Is Frequently Recurring And Of Great Significance. 5

C. Certiorari Is Warranted Because The Court Of Appeals Decision Is Wrong. 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Aguilar v. Mukasey, 128 S. Ct. 2961 (2008) 2

Carachuri-Rosendo v. Holder, 2009 WL 2058154 (Dec. 14, 2009) (No. 09-60) 3

Clark v. Martinez, 543 U.S. 371 (2005) 4, 12

Cruz-Garcia v. *Holder*, 129 S. Ct. 2424 (2009) 2

Dada v. Mukasey, 128 S. Ct. 2307 (2008) 3

Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006) 11

Hernandez De Anderson v. Gonzales, 497 F.3d 927 (9th Cir. 2007) 5

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997) 6

INS v. St. Cyr, 533 U.S. 289 (2001) ..... *passim*

Kellermann v. Holder, 2010 WL 252264 (6th Cir. Jan. 25, 2010) (No. 08-3927) 1, 4

Kucana v. Holder, 2010 WL 173368 (Jan. 10, 2010) (No. 08-911) 3

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 6, 10

Lovan v. Holder, 574 F.3d 990 (8th Cir. 2009) 2

Nijhawan v. Holder, 129 S. Ct. 2294 (2009) 3

Nken v. Holder, 129 S. Ct. 1749 (2009) 3

Olatunji v. Ashcroft, 387 F.3d 383 (4th Cir. 2004) 5

Zamora v. *Mukasey*, 128 S. Ct. 2051 (2008) 2

Zuluaga Martinez v. INS, 523 F.3d 365 (2d Cir. 2008) 5

Statutes

8 U.S.C. § 1182(c) ..... *passim*

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597 .... 1, 4, 10

Other Authorities

Application Process for Replacing Forms I-551 Without an Expiration Date, 72 Fed. Reg. 46922-01 (Aug. 22, 2007) 8, 9

Exec. Office for Immigration Review, Dep't of Justice, *FY 2008 Statistical Year Book* (2009) 7

Interoffice Memorandum from Michael L. Aytes, Assoc. Dir. of Domestic Operations, U.S. Citizenship and Immigration Servs., U.S. Dep't of Homeland Sec., to Reg'l, Dist., Field Office and Serv. Ctr. Dirs. And Nat'l Benefits Ctr. Dir. (May 11, 2007) 8

Office of Immigration Statistics, Dep't of Homeland Sec., *Estimates of the Legal Permanent Resident Population in 2008* (2009) 8

Sarah Koteen Barr, *C is for Confusion: The Tortuous Path of Section 212(c) Relief in the Deportation Context*, 12 Lewis & Clark L. Rev. 725 (2008) 7

U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Security, *Fact Sheet: Law Enforcement Support Center* (2009) 9

Rule

8 C.F.R. § 1212.3(h) 4

Judicial Materials

Brief for the United States in Opposition, *Armendariz-Montoya v. Sonchik*, 539 U.S. 902 (2003) (No. 02-1273) 6

Brief for the United States in Opposition, *Carachuri-Rosendo v. Holder*, 2009 WL 2058154 (Nov. 16, 2009) (No. 09-60) 3

Petition for a Writ of Certiorari, *INS v. St. Cyr*, 533 U.S. 289 (2001) (00-767) 4

Reply Brief for the United States, *United States v. O'Brien & Burgess*, No. 08-1569, *cert. granted*, 130 S. Ct. 49 (2009) 3

REPLY BRIEF FOR THE PETITIONER

What is not in dispute is that now eleven courts of appeals – every single court of appeals that regularly decides immigration cases – have created a multi-layered conflict on the question of whether Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-597, applies retroactively to pre-enactment convictions. And even by the government's own measure, that conflict will continue to affect hundreds upon hundreds of aliens for years to come. The government, moreover, does not dispute that this case squarely and cleanly presents the purely legal questions on which the courts of appeals are in intractable conflict. Instead, the government argues that it is perfectly tolerable for hundreds of individuals to be torn away every year from their children, family, and home based on nothing more than accidents of geography or prosecutorial forum choices. In addition, the government disagrees with petitioner on the merits. Neither argument provides a sound basis for denying certiorari.

A. The Conflict Has Expanded Still Further.

The government admits that the circuits are divided four ways over the application of *INS v. St. Cyr*, 533 U.S. 289 (2001), to convictions obtained following an alien's exercise of her Sixth Amendment right to a trial. Pet. 8-12; BIO 6. That conflict, in fact, got even deeper just before the government's response was filed. *See Kellermann v. Holder*, No. 08-3927, 2010 WL 252264, at *6-7 (6th Cir. Jan. 25, 2010). That decision, moreover, marked the second

expansion of the conflict since the court of appeals' decision in this case. *See Lovan v. Holder*, 574 F.3d 990, 993-994 (8th Cir. 2009). The problem thus is getting worse, not going away as the government contends.

Given that, the government's claims that such extreme and entirely arbitrary variation in life-altering consequences should be tolerated in perpetuity lack merit.

1. The government stresses (BIO 6) that certiorari has been denied before. True enough. But circumstances and the clear presentation of the question have changed. *See* Pet. 20-22. All but three of the petitions the government cites were denied before the circuit conflict arose in earnest in 2007, and thus before the depth and frequently recurring nature of the problem was clear. *See* BIO 6; Pet. 19-20. Moreover, in each of the three post-2007 petitions, the government argued that the question was not cleanly posed by the facts of the case.[1] They do not argue that here. And in two of those cases, the government urged the Court to delay review in light of a recent BIA regulation.[2] The government has now abandoned that contention, and for good reason, *see* Pet. 20.

---

[1] *See* BIO 10-11 (citing *Cruz-Garcia* v. *Holder*, 129 S. Ct. 2424 (2009)); BIO 7 (citing *Aguilar v. Mukasey*, 128 S. Ct. 2961 (2008)); BIO 7-9 (citing *Zamora* v. *Mukasey*, 128 S. Ct. 2051 (2008)).

[2] *See* BIO 10 (citing *Aguilar, supra*); BIO 14 (citing *Zamora, supra*).

More importantly, this is the first petition since the Eighth Circuit joined the Third in holding that Section 212(c) relief is categorically available to individuals like petitioner convicted after trial. *See* Pet. 8-9. The case thus warrants certiorari for exactly the reasons the government itself has told this Court (and with which this Court apparently agreed): "When the [Third] Circuit stood alone in its view, there was a reasonable chance that it would reconsider, perhaps in light of the * * * additional circuits that later came to disagree with it. Now, though, the [Eighth] Circuit has joined the [Third] Circuit * * * with a full view of the split; the chance that the [Third] and [Eighth] Circuits will both realign their views is remote." U.S. Pet. Reply, *United States v. O'Brien & Burgess*, No. 08-1569, at 3, *cert. granted*, 130 S. Ct. 49 (2009).

2. The government argues (BIO 10) that the conflict is "narrow." But the 2-4-5 conflict is now broader, more fractured, and more deeply entrenched than almost any other immigration case in which this Court has granted certiorari in recent memory. *See, e.g.*, *Carachuri-Rosendo v. Holder*, 2009 WL 2058154 (Dec. 14, 2009) (No. 09-60) (granting petition to address 4-2 split);[3] *Kucana v. Holder*, 2010 WL 173368, *5 & n.7 (Jan. 10, 2010) (No. 08-911) (resolving 1-6 split); *Nijhawan v. Holder*, 129 S. Ct. 2294, 2298 (2009) (3-3 split); *Nken v. Holder*, 129 S. Ct. 1749, 1755 (2009) (2-7 split); *Dada v. Mukasey*, 128 S. Ct. 2307, 2312 (2008) (4-3 split).

---

[3] *See* U.S. BIO, *Carachuri-Rosendo*, at 14.

More importantly, there is nothing "narrow" about a conflict in which fully half of the circuits deciding the question have rejected the *government's* own interpretation of the statute as set out in the Board of Immigration Appeals' regulations. *Compare* 8 C.F.R. § 1212.3(h) (categorical exclusion), *with* Pet. 8-11 (five circuits hold that relief is either always, or sometimes, available).

Indeed, when the circuits initially divided just 3-1 on the retroactivity of Section 212(c)'s repeal, it was the government that insisted this Court's certiorari review was warranted, emphasizing the need for uniformity and the importance of the question. *See* U.S. Pet. 28-29, *St. Cyr*, *supra*. The government offers no explanation for its sudden disinterest in the uniform and evenhanded treatment of thousands of identically situated aliens.

3. The impact of the conflict is not remotely narrow either. Had petitioner's case arisen in the Third or Eighth Circuits, instead of the Eleventh, she would be entitled to apply for relief and – the government does not dispute – very likely would have received it and been allowed to remain here in the Country in which she has lived for a quarter century with her U.S. citizen children and other family members, *see* Pet. 21. Likewise, individuals who can show actual or objectively reasonable reliance are entitled to apply for waivers in four circuits but are precluded from any possibility of relief in five others. Pet. 10-12; *Kellermann*, *supra*. That profound difference in outcomes is not because the statute requires it – nothing in the text invites such disparate operation. IIRIRA Section 304(b) has one meaning and one meaning only. *See Clark v.*

Martinez, 543 U.S. 371, 378 (2005). Instead, lawyers must advise their clients that the sole reason for their bar on relief and consequent deportation is geographical misfortune. That is neither right nor properly tolerated.

B. The Question Is Frequently Recurring And Of Great Significance.

Unable to dispute the breadth and depth of the circuit conflict, the government insists (BIO 15-18) that at some unspecified time in the future, the problem will go away. That makes no sense. The argument presumes that the courts of appeals have developed a special rule of retroactivity analysis confined to this one immigration law problem, and that they will abandon their widely divergent rules of retroactivity analysis and drop their repeated calls for this Court's guidance (*see* Pet. 16-18) when pre-IIRIRA Section 212(c) claims stop. That is not how binding circuit precedent works. In fact, the confusion is expanding, not retracting, as courts of appeals have expressly decried even outside the Section 212(c) relief context the "substantial confusion * * * throughout the Courts of Appeals" in retroactivity law, *Olatunji v. Ashcroft*, 387 F.3d 383, 390 (4th Cir. 2004), and the "considerable disagreement" in retroactivity law, *Hernandez De Anderson v. Gonzales*, 497 F.3d 927, 938 (9th Cir. 2007), which is subject to "much debate," *Zuluaga Martinez v. INS*, 523 F.3d 365, 386 (2d Cir. 2008) (Straub, J., concurring). Thus, while the broad conflict that has arisen concerning Section 212(c) merits this Court's review in its own right, the conflict it documents in the courts of appeals' retroactivity law and the need for this Court's

correction is far deeper and enduring than this particular immigration context.

In any event, even this particular question of immigration law will likely not go away in our lifetimes, which should be more than sufficient to warrant certiorari. What the government's argument overlooks is that the retroactivity question here is far more enduring than in almost every other context. In *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the retroactivity question was confined to cases pending at the time of enactment. In others, like *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), statutes of limitations have cabined the reach of laws imposing consequences on pre-enactment conduct.

Not so here. There is no statute of limitations – none – on removal for long-past offenses. That is why the government provides the Court with no end date for the dramatic divergence in removal standards it asks this Court to tolerate. Indeed, although the government has been predicting for seven years that the stream of cases would subside,[4] the government now acknowledges (BIO 15) that nearly sixty court of appeals cases have raised the question.

That is just the beginning. As the government itself explains (BIO 15), those cases represent only the first wave of litigation to have worked its way through the system. *See ibid.* (noting that, because "some immigration cases remain pending for a long

---

[4] *See, e.g.*, U.S. BIO 15, *Armendariz-Montoya v. Sonchik*, 539 U.S. 902 (2003) (No. 02-1273).

time," most of the reported decisions arose from proceedings commenced prior to 2001). Even if the government never again attempted to remove another person with a pre-1997 conviction, there would still be nine years' worth of cases in the pipeline.

The government, however, points (BIO 17-18) to a decrease in the number of Section 212(c) applications and grants, comparing numbers from 2004 and 2008. But those same statistics show that decreases can be short-lived, and that the number of grants fluctuates from year to year. Indeed, between 2005 and 2006, there was a 33% increase in the grant of Section 212(c) relief. *See* Exec. Office for Immigration Review, Dep't of Justice, *FY 2008 Statistical Year Book* Table 15, at R3 (2009), *available at* http://www.justice.gov/eoir/statspub/fy08syb.pdf. [5]

In any event, the government offers no reason why a rule that continues to affect hundreds, if not thousands, of aliens thirteen years after *St. Cyr* is insufficient to warrant this Court's review. At the current rate, it will be another *fifteen years* before the number of granted waivers falls below 75 per year. *See* BIO 17-18 (describing 55% decline in five years,

---

[5] The recent decline in applications and grants is likely due in large part to other developments in the Bureau of Immigration Appeals' interpretation of Section 212(c). *See* Sarah Koteen Barr, *C is for Confusion: The Tortuous Path of Section 212(c) Relief in the Deportation Context*, 12 Lewis & Clark L. Rev. 725 (2008).

resulting in current grant of 858 applications in FY2009).

The government also cites a renewal obligation for aliens given green cards after 1989 (BIO 18 n.7). But even assuming the government had conducted criminal background checks as part of that renewal process – something the government does not claim occurred[6] – there are more than *three million* lawful permanent residents who first obtained their status prior to 1990 and therefore have not had to renew their green cards.[7] And that group may soon swell the pool of aliens affected by the circuit conflict, because the Department of Homeland Security has issued proposed rules that would require lawful permanent residents issued non-expiring green cards to apply for renewable cards. *See Application Process for Replacing Forms I-551 Without an Expiration Date*, 72 Fed. Reg. 46922-01 (Aug. 22, 2007). Among other things, the new regulation is designed to allow the government to conduct background checks on applicants and identify individuals subject to removal

---

[6] It appears that systematic fingerprint checks were not begun until 2006. *See* Interoffice Memorandum from Michael L. Aytes, Assoc. Dir. of Domestic Operations, U.S. Citizenship and Immigration Servs., U.S. Dep't of Homeland Sec., to Reg'l, Dist., Field Office and Serv. Ctr. Dirs. And Nat'l Benefits Ctr. Dir. (May 11, 2007), *available at* http://www.uscis.gov/files/pressrelease/I90EPSNS051107.pdf.

[7] *See* Office of Immigration Statistics, Dep't of Homeland Sec., *Estimates of the Legal Permanent Resident Population in 2008* Table 3 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_lpr_pe_2008.pdf.

for, *inter alia*, committing crimes in the past. *Id.* at 46923-46924.

Nor does the government provide any answer to the showing that other recent developments will likely lead to an increase in proceedings against individuals with pre-1997 convictions in the coming years. *See* Pet. 16; Amici Br. 7-13. Indeed, the government itself has explained that it is now receiving a record number of referrals from local law enforcement agencies.[8] Of particular significance, the government's "Secured Communities" program is expected to increase by *ten-fold* the number of individuals identified for removal based on recent arrests when it is fully implemented in 2013. *See* Amici Br. at 11.

Finally, the passage of time magnifies, rather than diminishes, the importance of the questions presented. As time goes by, those affected have increasingly stronger claims to Section 212(c) relief. At the same time, the considerations counseling against retroactivity grow more acute. Petitioner and many others like her made decisions based on the pre-IIRIRA state of the law decades ago, paid their debts to society, and went on to live many years as law-abiding, productive members of their communities. Had the government responded promptly to their initial convictions, individuals like petitioner would have been entitled to apply for

---

[8] *See also, e.g.*, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Security, *Fact Sheet: Law Enforcement Support Center* (2009), *available at* http://www.ice.gov/doclib/pi/news/factsheets/lesc.pdf.

Section 212(c) waivers, and many would have received them. But the government delayed, even while those affected matured, started families, paid their taxes, and developed reasonable expectations that they had put their past transgressions behind them.

C. Certiorari Is Warranted Because The Court of Appeals Decision Is Wrong.

Unsurprisingly, the government and petitioner disagree on the merits of the retroactivity question. BIO 12-15. That is a commonplace in cases meriting this Court's review, not a reason to deny review of a conflict of this breadth and frequency of recurrence. Right or wrong, IIRIRA Section 304(b) should have one meaning.

In any event, the government is incorrect to argue (BIO 12-15) that, as a matter of law, aliens could not have reasonably relied on the continuing availability of Section 212(c) waivers in deciding whether to commit the crime or to go to trial. *St. Cyr* itself made clear that the retroactivity of a statutory provision does not turn on any single factor, such as reliance. *See, e.g., St. Cyr*, 533 U.S. at 321 & n.46. What is most critical, if not dispositive, is whether the statute "attaches new legal consequences to events completed before its enactment," *Landgraf*, 511 U.S. at 270, even if the underlying conduct was itself previously unlawful, *id.* at 282 n.35. And courts must assume that Congress did not mean to create that unfairness, unless it clearly expresses a contrary intent. *See, e.g., Landgraf, supra.*

The government does not dispute that the repeal of Section 212(c) attaches new legal consequences to petitioner's pre-enactment conviction. In *St. Cyr*, the

Court explained that the difference between "facing possible deportation and facing certain deportation" was of critical retroactivity significance, and that the repeal of Section 212(c) was comparable to the repeal of an affirmative defense or the imposition of a mandatory minimum sentence, both of which the Court has held to have retroactive effect. 533 U.S. at 325.

The Government nonetheless insists (BIO 7) that this Court narrowed the traditional retroactivity inquiry in *St. Cyr*. But the Court's discussion of reasonable reliance in *St. Cyr* simply shows that it can sometimes be a sufficient ground for finding retroactive effect, not that it is indispensable. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006), is no help to the government either. The Court, in fact, reiterated that statutes have retroactive effect if they "increase a party's liability for past conduct." *Id.* at 37 (citation omitted). The Court in that case simply concluded that the principle was not implicated because the statute in question was triggered by the immigrant's post-enactment decision to stay in the country rather than his pre-enactment unlawful entry. *Id.* at 42-43.

Beyond that, reasonable reliance exists in this context. As petitioner has explained, and the government has ignored (*see* BIO 13-15), an immigrant could reasonably believe that going to trial (with the possibility of avoiding a conviction for a deportable offense) would be the best way to prevent deportation, knowing that the downside risk was limited by the availability of Section 212(c) relief. *See* Pet. 25.

Furthermore, as the government itself explained in *St. Cyr*, Section 212(c) "makes no distinctions at all based on whether an alien has pleaded guilty or not guilty." U.S. Br. 47. "There is therefore no basis in the statute for distinguishing, as the court of appeals did, between aliens who pleaded guilty and those who did not, in determining whether the repeal of Section 1182(c) would contravene the presumption against retroactivity." *Ibid.* *Clark v. Martinez*, 543 U.S. 371 (2005), has proved the accuracy of that argument. To draw the utterly atextual distinction the government favors in Section 212(c)'s text "would be to invent a statute rather than interpret one." *Clark*, 543 U.S. at 378.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Amy Howe
Kevin K. Russell
Howe & Russell, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814
(301) 941-1913

Patricia A. Millett
Counsel of Record
Thomas C. Goldstein
Monica P. Sekhon
Akin, Gump, Strauss,
Hauer & Feld LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000
pmillett@akingump.com

February 17, 2010